

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MITKO TODOROV,

Defendant-Appellant.

UNPUBLISHED

August 16, 2005

No. 253945

Charlevoix Circuit Court

LC No. 03-000826-FH

Before: Zahra, P.J., and Cavanagh and Owens, JJ

PER CURIUM.

Defendant appeals as of right his jury trial convictions for breaking and entering, MCL 650.110, resisting and obstructing a police officer, MCL 750.81d(1), and receiving and concealing stolen property over \$200 but less than \$1000, MCL 750.535(4)(a). We affirm.

Defendant argues that he was denied a fair trial where the prosecutor allegedly elicited testimony from a police officer concerning defendant's post-arrest, post-*Miranda*¹ silence. Defendant also asserts that the prosecutor then improperly commented on the testimony during closing arguments. Because there was no objection to the alleged instances of prosecutorial misconduct, we review to determine whether defendant can show plain error that affected his substantial rights. *People v Rodriguez*, 251 Mich App 10, 32; 650 NW2d 96 (2002).

A prosecutor may not use a defendant's silence at the time of arrest and after receiving *Miranda* warnings as evidence at trial because it violates a defendant's due process rights. *People v Dennis*, 464 Mich 567, 573; 628 NW2d 502 (2001), citing *Doyle v Ohio*, 426 US 610; 96 S Ct 2240; 49 L Ed 2d 91 (1976). However, a "defendant's right to due process is implicated only where his silence is attributable to either an invocation of his Fifth Amendment^[2] right or reliance on the *Miranda* warnings." *People v Solmonson*, 261 Mich App 657, 664-665; 683 NW2d 761 (2004). In this case, a police officer testified that after being informed of his *Miranda* rights and asked whether he understood them, defendant did not answer the question and was evasive. Because defendant's silence was only in response to whether he understood his

¹ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

² US Const, Am V.

rights and because defendant subsequently gave several statements to police, it cannot be said that any silence the officer testified to was “attributable to either an invocation of his Fifth Amendment right or his reliance on the *Miranda* warnings.” *Id.* Therefore, defendant’s due process rights were not violated by the officer’s testimony.

As for defendant’s claim that the prosecutor commented on his post-arrest silence during his closing arguments, it is clear that the prosecutor was arguing that defendant’s differing statements on why he was in the area of the Ingalls’ Country Store that night, not his silence, impeached defendant. At trial, defendant testified that he was threatened and then attacked by a police officer when defendant innocently entered the area of the store. At the time of his arrest, defendant first explained that he was a store employee and then stated that he was there looking for a bathroom.

There was nothing wrong with the prosecutor’s argument. “In general, where a defendant ‘takes the stand and testifies in his own defense, his credibility may be impeached and his testimony assailed like any other witness.’” *People v Fields*, 450 Mich 94, 110; 538 NW2d 356 (1995), quoting *Brown v United States*, 356 US 148, 154; 78 S Ct 622; 2 L Ed 2d 589 (1958). Although the prosecutor questioned why defendant did not say he was threatened and attacked when additional officers arrived on the scene, he did not make these comments in reference to defendant’s silence when asked whether he understood his *Miranda* rights. Rather, the prosecutor referenced defendant’s on-scene explanations to police for his presence in the area. The prosecutor emphasized for the jury that defendant’s explanations did not include any report of this attack. Further, “a prosecutor may comment on a defendant’s failure to report a crime when reporting the crime would have been natural if the defendant’s version of events were true.” *People v Goodin*, 257 Mich App 425, 432; 668 NW2d 392 (2003).

Defendant also argues that his trial counsel was ineffective for failing to object to the prosecutor’s actions. Because we conclude that there were no improper references on defendant’s post-arrest, post-*Miranda* silence, defense counsel cannot be faulted for failing to object. See *Strickland v Washington*, 466 US 668, 688; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

Affirmed.

/s/ Brian K. Zahra
/s/ Mark J. Cavanagh
/s/ Donald S. Owens